Supreme Court of the United States.

MARTHA RAPHAEL, Administratrix of the estate of Nathaniel W. Raphael, deceased, Appellant, AGAINST SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY and ACOSTA NICHOLS, Appellees.	October Term, 1903. No. 229.

Appeal from the Circuit Court of the United States for the Southern District of New York.

APPELLANT'S BRIEF AND ARGUMENT.

April 30, 1901, Nathaniel W. Raphael in his life time, since deceased, as a citizen of the State of New Jersey, on his own behalf and on behalf of certain other bondholders hereinafter described, filed a bill of complaint in the court below against the appellees as citizens of the Southern District of New York (P. R., 1 to 9).

In that bill of complaint it is alleged that the said Raphael on the 7th January, 1901, had filed a certain bill of complaint in the United States Circuit Court for the District of Utah, against the Rio

Grande Western Railway Co. and others to foreclose certain second mortgage bonds of the Wasatch and Jordan Valley Railroad Company, secured upon the Bingham and Alta Spurs of that portion of said railway company. A copy of the Utah bill (P. R,, 17 to 41) is annexed and made a part of the bill of complaint in the court below. The prayer of the Utah bill is for a redemption from the foreclosure sale of two certain underlying mortgages upon said spurs, which had been illegally foreclosed in 1881, and under which sale the said Rio Grande Western Company had entered into possession of that part of said road in controversy, and for a foreclosure of said second mortgage bonds. The Utah bill alleged that the mortgaged property was inadequate security for the payment of said second mortgage bonds, and that said Rio Grande Western Company had received enough net earnings since it went into possession of these spurs, from the operation of the mortgaged portion of the road in question, to more than pay off said underlying mortgages, and had on hand out of the net earnings of the mortgaged road over $800,000 applicable to the payment of said second mortgage bonds. The Utah bill alleged that there are $884,000 of said second mortgage bonds ontstanding, and that the complainant, Raphael, is the owner of 579 of said second mortgage bonds, and that there is due of interest on said 579 bonds the sum of $825,976.83, a total of principal and interest of $1,404,970.83.

The bill of complaint in the court below further alleges that the appellees composing the firm of Spencer Trask & Company, carrying on business as bankers in the City of New York, caused to be published an advertisement in the *New York Herald* of April 2, 1901, in which it is stated that:

"Since the commencement of the negotiations one Raphael has instituted in the United States Circuit Court for Utah a suit against the title of the Western Company, to the Bingham and Alta spurs of its railroad; and in making the contract

for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the eighty dollars per share and interest mentioned above we shall therefore deduct such amount per share as counsel shall advise us will amply protect us from such guarantee. *Such amount will be held in a special trust.*"

The bill of complaint in the court below further alleges that in the same issue of the *New York Herald*, as the above advertisement, there appeared also an advertisement published by the Denver and Rio Grande Railroad Company for a meeting of its stockholders, to vote upon a proposition to purchase the stock, referred to in the advertisement of Spencer Trask & Co., of the Rio Grande and Western Railway Company.

The bill of complaint in the court below also further alleged that the said appellee, George Foster Peabody, in an affidavit used by appellees in opposition to the motion of Mr. Raphael, as complainant in the Utah suit, for the appointment of a receiver of the railroad in controversy in the Utah suit (P. R., 73), stated, viz.:

"The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Railway Company itself, over its debts, but also by a special amount *to be held in trust.*"

The bill in the court below further alleges that the suit in Utah is at issue and still pending and undetermined.

April 30, 1901, on filing of the bill of complaint in the court below, the Court ordered appellees to show cause by May 1, 1901, why a preliminary injunction should not issue restraining the appellees from selling and delivering the said shares of the Rio Grande

Western Company, and in the meantime be staid from selling and delivering said shares until the further order of the Court (P. R., 10).

May 1, 1901, on the hearing of the return of the said order to show cause, the appellees appeared specially by counsel *to object to the jurisdiction of the Court* and to sustain their contention in that regard filed affidavits of the appellees Edwin M. Bulkley and Charles J. Peabody asserting that they were not citizens of the Southern District of New York, but were citizens of the State of New Jersey (P. R., 10 and 15), the same State as complainant Raphael.

George Foster Peabody, in his affidavit, stated he was not a citizen of the Southern District of New York but was a citizen of the Eastern District of New York (P. R., 14).

Spencer Trask, in his affidavit, stated he was not a citizen of the Southern District of New York but was a citizen of the Northern District of New York (P. R., 15).

Acosta Nichols, in his affidavit (P. R., 16), admitted that he was a citizen and resident of the Southern District of New York.

All of the appellees admitted in said affidavits that they were members of the firm of Spencer Trask & Co., and were carrying on business as bankers in the said Southern District of New York.

Thereupon his Honor, Addison Brown, District Judge, sitting as United States Circuit Judge, made the following order that appellees be—

"enjoined until the further order of the Court (P. R., 87), from paying out or parting with the fund or moneys for indemnity to them or *special trust* which shall come to be or be in their hands or under their control, pursuant to their advertisement bearing date the 2d day of April, 1901, thereafter published addressed to the 'Stockholders of the Rio Grande Western Company,' a copy of which is set forth in the complainant's moving papers."

June 10, 1901 (P. R., 88) the subpœna issued against the defendants on filing the bill of complaint in the court below were served upon all the appellees by the United States Marshal in the Southern District of New York.

July 1, 1901, the appellees filed a plea (P. R., 89) in bar to the bill of complaint in the court below, averring that the plaintiff, said Raphael, and the said appellees, Edwin M. Bulkley and Charles J. Peabody, were both citizens of the State of New Jersey, and that therefore none of the appellees were bound to make answer to the bill of complaint filed against them in the court below.

August 29, 1902, the said plea to the jurisdiction having been heard before his Honor Edward B. Thomas, District Judge of the Eastern District of New York, sitting as Circuit Judge for the Southern District of New York, filed his written opinion sustaining the said plea to the jurisdiction (P. R., 91-94), and authorized a dismissal of the bill of complaint filed in the court below.

September 15, 1902, no order having been entered dismissing the said bill of complaint in the court below, the complainant, Mr. Raphael, made application before his Honor Alfred C. Coxe, United States Circuit Judge for the Southern District of New York, who granted an order (P. R., 95, 96) directing the appellees to show cause by October 20, 1902, why the said complainant Raphael should not have leave to amend his said bill of complaint to which said plea had been sustained in the court below.

The proposed amendments to said bill of complaint (P. R., 102, 107) offered to dismiss as to the appellees Edwin M. Bulkley and Charles J. Peabody, claiming to be citizens of the State of New Jersey, and alleging that said appellees are only junior members of the banking firm of Spencer Trask & Co.; that the principal members of said firm are Spencer Trask and George Foster Peabody, the appellees, and that there is no intention of holding any members of the said firm personally on any money

judgment; that the only object of the suit is to subject the said fund to the control of the Court pending the suit in Utah, and that it is believed the rights of the said Raphael as complainant and all the interests of the appellees as members of said firm can be litigated and determined in an action against the remaining appellees, Spencer Trask, George Foster Peabody and Acosta Nichols, without joining as defendants the said non-residents Edwin M. Bulkley and Charles J. Peabody.

The proposed amendments to the said bill also alleged that the said Denver and Rio Grande Railroad Company, which sought to take over the said shares of the capital stock of the Rio Grande Western Railroad Company, referred to in said advertisement, had never paid any dividend upon its common stock and had only paid four per cent. per annum upon its preferred stock; while the Rio Grande Western Railway Company's net earnings per mile of road owned and operated for the year 1900 is $644 greater than the Denver and Rio Grande Railroad; and that the real object of the proposed purchase of the Utah Road by the Colorado Road is to enable the surplus earnings of the Utah road to be acquired for the purpose of making up the deficiency of earnings of the Colorado road.

The proposed amendments to the said bill further allege that the Missouri Pacific Railroad which makes connection with the said Colorado Road at Pueblo, in the State of Colorado, intends to acquire the Colorado Road immediately after the Colorado Road has acquired the Utah Road, and that the scheme was then to substitute for the directors of the Utah and Colorado Road the same directors of the Missouri Pacific roads so acquired shall become a part and parcel of the Missouri and Pacific Railway system.

The proposed amendments further set forth (P. R., 104), that the owners of the shares of the capital stock of the Rio Grande Western, out of which said fund was allowed to be created, agreed with the

said appellees that the said fund should be created for the purpose of paying out of said fund the amount which might be found to be due complainant on his said bonds in case he succeeded in his Utah suit.

Said proposed amendments further state that the said firm of Spencer Trask & Co. were the fiscal agents of the Rio Grande Western Company, and were such at the time the bill was filed in the Utah suit, and that said appellees knew of the filing of the bill of complaint in the Utah suit, and that at the time the said fund was agreed to be created the appellees knew that said fund was agreed should be used to pay any deficiency judgment which the said Raphael, as complainant, might obtain in the Utah suit.

The proposed amendments (P. R., 105) further state that the mortgaged road in litigation in the Utah suit produces greater earnings per mile of road of the said Rio Grande Western Railway Company than any portion of that road; that it is situated in the Western mountains of the Jordan Valley in Utah, in the great copper and other mining regions of that locality, and that the representatives of the Colorado Road, the proposed purchaser of the Utah Road, agreed with the appellees as a condition of purchase of said shares of the Utah Road that these spurs should not be foreclosed under the foreclosure proceedings in the Raphael suit in Utah, but that if Mr. Raphael succeeded in his said Utah suit, said fund should be used in liquidating Mr. Raphael's said claim without a foreclosure of said spurs.

The proposed amendments further state (P. R., 105), that a greater portion of said 90 per cent. of stock of the Rio Grande Western Company, referred to in said advertisement of Spencer Trask & Co., was owned by the Rio Grande Western Construction Company, a corporation which built the Rio Grande Western Railroad Company, and a portion were owned by the said appellees, George Foster Peabody and Spencer Trask, and portion were owned

by one William J. Palmer, who at that time was the president of the Rio Grande Western Railroad Company and who had been such president ever since that road was built, and also a portion owned by the firm of Spencer Trask & Co., and all of whom were in turn the owners of a majority of the capital stock of said Construction Company, and that it was by the consent of said Construction Company, said William J. Palmer, George Foster Peabody and Spencer Trask that the said fund should be created to be used as a fund to pay off complainant's claim when established in the Utah suit.

October 20, 1902, at the hearing of the order to show cause before Judge Cox as to why Mr. Raphael, as said complainant, should not be allowed to amend his said bill of complaint as above, Mr. Raphael presented his verified petition (P. R., 96 to 99) for leave to file a supplemental bill, setting forth that since the filing of said original bill, in the Court below (P. R., 98), the moneys realized from the sale of the said shares of the Rio Grande Western Company to the Denver and Rio Grande Railway Company, has been set aside by the appellees, as a *special trust*, and that the said fund is now in possession and control of the appellees, and that in pursuance of the original scheme as set forth in the original bill in the court below, the Missouri Pacific Railroad has purchased a controlling interest in all the shares of the capital stock of the said Utah Road and said Colorado Road, and that the Missouri Pacific Railway Company, has the same set of directors in the Utah Road, and the Colorado Road, as in the Missouri Pacific Road, and that the same officers of the Missouri Pacific Road, are the same officers governing and managing the said Colorado and said Utah Road.

The prayer of the supplemental bill (P. R., 98) is that the said fund be turned over to a receiver or trustee to be selected by the Court, and that in case Mr. Raphael, the said complainant, should succeed

in the Utah suit, that the said fund be applied towards the payment of any deficiency judgment which the complainant may sustain in the foreclosure and sale of those spurs of the Utah Road, and for such other relief as may be necessary and proper.

October 28, 1902, Judge Cox filed an opinion (P. R., 119–120), and on the 7th day of November, 1902, made an order denying said motion for leave to amend said bill of complaint filed in the Court below, and denied said motion to file a supplemental bill of complaint (P. R., 120).

November 15, 1902, Judge Thomas entered an order (P. R., 94, 95) sustaining appellee's plea to the jurisdiction, and dismissing the bill of complaint filed in the Court below, and vacating the said restraining order issued by Judge Brown of May 1, 1901, prohibiting the appellees from paying out or parting with the funds or moneys for indemnity or *special trust.*

November 17, 1902, Mr. Raphael having perfected an appeal to this Court from the order dismissing the bill of complaint in the Court below, made the following (P. R., 123–124):

Assignment of Errors.

I.—The Court erred in entering a decree dismissing complainant's bill of complaint for want of jurisdiction.

II.—The Court erred in sustaining the plea interposed by the defendants to said bill of complaint.

III.—The Court erred in failing to overrule the plea interposed by the defendants to said bill of complaint.

IV.—The Court erred in holding that complainant's bill of complaint was not ancillary to complainant's suit pending in the United States Circuit Court for the District of Utah.

V.—The Court erred in not holding that complainant's bill of complaint was ancillary to complain-

ant's suit pending in the United States Circuit Court for the District of Utah.

VI.—The Court erred in not dismissing the plea interposed by all of the defendants to said bill of complaint as an insufficient plea on the part of said defendants Spencer Trask, Foster Peabody and Acosta Nichols.

VII.—The Court erred in not holding that the "fund" provided for by the defendants arose from the sale in part of shares of the capital stock of the Rio Grande Western Railway Company issued upon that part of the lines of railroad which was the subject matter of complainant's suit in Utah, and that complainant had a right in this action to be subrogated to the rights of the defendants as an indemnity or special trust "fund" on the determination of the Utah suit.

VIII.—The Court erred in not holding that the defendants were trustees for the complainant with reference to said "fund."

IX.—The Court erred in holding that under complainant's bill of complaint the complainant had no right to any relief in reference to said "fund."

X.—The Court erred in holding that the original bill or the proposed amended bill was not ancillary to the action pending in Utah.

XI.—The Court erred in not holding that the original bill or the proposed amended bill was ancillary to the action pending in Utah.

XII.—The Court erred in holding that Edwin M. Bulkley and Charles J. Peabody were indispensable parties as defendants to this action.

XIII.—The Court erred in not holding that Edwin M. Bulkley and Charles J. Peabody were not indispensable parties as defendants to this action, and that the rights of the parties with reference to the "fund" in question could have been litigated and determined by retaining as defendants Spencer Trask, George Foster Peabody and Acosta Nichols, and dismissing the action as to the defendants Edwin M. Bulkley and Charles J. Peabody.

Nathaniel W. Raphael died after perfecting this appeal, and his administratrix was substituted as appellant.

POINTS.

POINT I.

The bill in the Court below is brought to stay waste, and for general relief.

The bill in the Utah suit alleges that the mortgaged property is inadequate security for the mortgaged debt.

The bill in the Court below alleges that the published notices show an intention to pass the title of the Rio Grande Western to the Denver and Rio Grande.

The proposed amendments to the bill of complaint, in the Court below, allege that the Colorado Road has never paid any dividends on its common stock and only a four per cent. annual dividend upon its preferred stock, and that the object of the purchase of the Utah Road by the Colorado Road, is for the purpose of using the surplus earnings of the Utah Road to make up the deficiency of earnings of the Colorado Road, and that such change of title would hinder and delay the collection of complainant's claim in his Utah suit.

A bill to restrain waste is allowed where waste is apprehended, because the whole estate is a security for the mortgage indebtedness, not only embracing the railroad property, but the surplus income, and the net earnings covered by the terms of the mortgage.

The complainant is entitled to have the mortgaged property come to him, if he succeeds in the Utah suit, in the same condition in which it was at the time the Utah suit was commenced.

The bill in the Utah suit alleges that there is over $800,000 of net earnings of the Rio Grande Western, coming from the mortgaged property applicable to complainant's claim, and that there is a well

grounded apprehension of waste of that surplus if the sale of the shares is allowed to be carried out.

Chancery goes to great length in staying waste. It is a wholesome jurisdiction to be liberally exercised in the prevention of irreparable injury.

The Chancellor in Equity says to these appellees in the case at bar, you have no right to put beyond the control of the complainant these $800,000 of net earnings of the Rio Grande Western, which have come from the mortgaged property in question, without first obtaining complainant's consent; you must make a bargain with complainant if you wish the sale of the shares to go through, by creating a "fund" out of the sale of these shares, so that the complainant's claim can be paid in case he succeeds in the Utah suit.

This is what the appellees consented to do when they say, in that advertisement, that:

"Since the commencement of the negotiation one Raphael has instituted in the United States Circuit Court for Utah a suit against the title of the Western Company to the Bingham and Alta Spurs of its railroad; and in making the contract for the vendors, our firm gave its personal guarantee against any liability of the company in that suit." * * * "From the $80 per share and interest mentioned above we shall therefore deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. *Such amount will be held in a special trust.*"

And as a further evidence of such a bargain the appellee, George Foster Peabody, says in his affidavit:

"The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts, *but also by a special amount to be held in trust*, * * * as it gives a greater assurance that, *if the complainant's claim shall be established, it will be paid.*"

Lanier v. *Allison*, 31 Fed. Rep., 100.

Smith v. *City Council of Rome*, 19 Ga., 89.

Griffin v. *Sketoe*, 30 Ga., 300.
Markham v. *Hall*, 33 Ga., 508.
Marshall v. *Turnbull*, 32 Fed. Rep., 124.
High on Injunction, first edition (Sec. 4-257, 262, 421, 458).

Where irremediable mischief going to the destruction of the substance of the estate is being done by the person in possession to an estate in litigation at law, an injunction will be issued to them.
Erhardt v. *Boaro*, 113 U. S., 537.

Judge Speer, in the case of Lanier *v.* Allison, in U. S. Circuit Court, Eastern District of Georgia, June 4, 1887, 31 Fed. Rep., 102, in rendering the opinion of the Court, says:

"This is a bill for an account, and to restrain waste; and Lord Eldon is reported to have said that 'if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.' This doctrine has been greatly modified in modern times, and it is now a common practice, is cases where irremediable mischief is being done *or threatened*, going to the destruction of the estate, * * * to issue an injunction, though the title to the premises be in litigation. The authority of the Court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title."

Justice Field, in the case of Ehrardt *v.* Boaro, 113 U. S., 537, in rendering the opinion of the Court, says:

"This is a suit in equity ancillary to the action for the possession of the mining claim just decided. It is brought to restrain the commission of

waste by the defendant, pending the action. The bill prays for a writ of injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, until the final determination of the action at law. * * * The Court granted a preliminary injunction, but after the trial of the action at law, judgment being rendered therein in favor of the defendants, it dissolved the injunction and dismissed the bill. From the decree of the Court the case is brought here by appeal (here follows the language quoted above in Lanier *v.* Allison, *supra*). As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues. The decree of the Court below must, therefore, be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered."

Judge Lacombe, in the case of Marshall *v.* Turnbull, in the United States Circuit Court for the Eastern District of New York, August 10, 1887, in rendering the opinion of the Court (32 Fed. Rep., 125), says:

"This is an application for a preliminary injunction to restrain defendants George Turnbull and the Pederrale's Company, their agents, associates, servants, &c., from committing any injury upon a certain tract of land in the delta of Orinoco, or doing any other act to the prejudice of the complainant, who is the holder of certain bonds which said tract of land is mortgaged to secure. The defendant Turnbull raises a preliminary objection, viz., that the Court has no jurisdiction of the action, the bill being for the foreclosure of a mortgage on lands situated in a foreign country. The question of jurisdiction need not be considered at this stage of the proceedings so far only as it is

is germane to the matter now before the Court. The particular relief prayed for in the bill, and which the Court is now asked to extend to complainant, is concededly within the power of this Court. A defendant properly served, may be enjoined from committing waste upon, *or otherwise impairing the value of property in which the complainant is interested*, even though the property is located abroad, provided a case for the interposition of a court of equity is made out."

The bill in the Court below is filed for the double purpose of preventing waste of the suplus earnings of the mortgaged premises in the Utah suit, or restraining the parting with or paying out of said trust fund until sale of the shares of the capital stock of the Utah Road to Colorado Road.

The objection to the jurisdiction admits that if the Court had jurisdiction the allegations of the bill as to prospective injuries are true.

High on Injunctions, Sec. 4, says:

"The sole object of an interlocutory injunction is to *preserve the subject in controversy, in its then condition, and without determining any question of right*, merely to prevent the further perpetration of wrong or the doing of any act whereby *the right* in controversy may be injured or endangered * * *. The jurisdiction, therefore, being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of and preserve matters in *statu quo*.

Sec. 5. "And in order to sustain an injunction for the protection of property *pendente lite* it is not necessary to decide in favor of the plaintiff upon the merits, nor is it necessary that he should present such a case that will certainly entitle him to a decree upon the final hearing, since he may

be entitled to an interlocutory injunction, although his rights to the relief prayed may ultimately fail."

Sec. 262. "The owner of farming lands, who has a mortgage upon the stock and utensils of his tenant, as well as upon the interest of the tenant in the crops being raised thereon, has been allowed an injunction to prevent a sale under execution against the tenant of equity in the property thus mortgaged, the relief being extended upon the ground of irreparable injury and the difficulty of estimating the damages at law which would result from permitting the sale."

POINT II.

The appellees having voluntarily offered protection to the complainant on account of threatened waste by the creatiou of a fund in case the complainant succeeds in his Utah suit, it was error to dismiss the bill of complaint as there was no *mala fides* manifest.

POINT III.

One federal Circuit Court has an inherent ancillary jurisdiction to hear and determine all petitions for relief presented to it in respect of the property over which another federal Circuit Court has already acquired primary jurisdiction.

If a threatened waste of the mortgaged property under foreclosure in the primary action is appre-

hended, the mortgagor is not compelled to wait the uncertain delays of the foreclosure suit in the primary action before taking steps to assert his rights. He may proceed against the threatened waste by an ancilliary suit.

POINT IV.

Equity Rule 57 provides that if the suit shall become defective by reason of the happening of an event after the filing of the bill, it is the duty of the party desiring to take advantage of such an event and seek to have a supplemental bill or other pleading filed in the cause, to move the Court without unnecessary delay after the knowledge of such an event shall have come to such moving party.

Jons Rules of Practice, Equity Rules 57 and 58.
Notes and Decisions.
Daniell's Chancery Practice, 779 *et seq.*; *Id.*, 1515 *et seq.*
Mitford & Tyler's Pleadings E. Pr. in Equity, Chap. 4, pp. 158, 172.
Kennedy v. *Bank of Georgia*, 8 How., 586.
Sneed vs. *McCoul*, 12 How., 407.
Shaw vs. *Bell*, 95 U. S., 10.
Chester v. *Life Assn. of America*, 4 Fed. R., 487.
Mosgrove vs. *Coons*, 14 Fed. R., 317.

Under Equity Rule 35 (P. 1260, Foster's Fed. P., Vol. 2) the Court in its discretion, upon motion of the plaintiff after a demurrer or plea is allowed, to

grant the plaintiff leave to amend so as to cure the defects sustained, as in the case at bar, viz.:

1. Amend by striking out the names of the appellees residing in the State of New Jersey.

2. By showing that Spencer Trask & Company were the financial agents of the Rio Grande Western and that the "fund" was created for the purpose on the part of the sellers of the stock to enable the claim of the appellant, the plaintiff in the court below, to have his claim paid, in case he succeeded in the Utah suit and to prevent a foreclosure.

This the appellant offered to do and tendered to the Court the amendments so that the litigation would be only between a citizen of New Jersey and the three remaining members of the firm of Spencer Trask & Company; Spencer Trask, George Foster Peabody and Acosta Nichols.

(*A.*) Parties with the naked, legal title having no interest in the controversy—as trustees—can always be omitted as defendants (Simms *vs.* Guthrie, 9, Cranz, 19).

Boon's Heirs *vs.* Chiles, 8 Pet., 689.
Union Bank *vs.* Stafford, 12 How., 327.
New Orleans Canal, Etc., *vs.* Stafford, 12 How., 343.
Waldon *v.* Skinner, 101 U. S., 577.
Bacon *v.* Rives, 106 U. S., 99.

(*B*). In a suit against a firm by strangers, a partner beyond the jurisdiction may be omitted if no injustice will be done him by a decree in his absence.

Voss v. *Philbrook*, 3 Story, C. C., 335.
O'Harar v. *McConnell*, 93 U. S., 150.
Thayer v. *Life Association*, 112 U. S., 717.
American Bible Society v. *Price*, 110 U. S., 61.

In England, it has been held in accordance with a *maxim de minimus non cural lex* that when the interest of the absent person is evidently very small the Court will dispense with his presence in the suit.

Mechanics' Bank v. *Seton*, 1 Pet., 299.

(*C.*) Relaxation as to the rule as to parties in special cases.

Caldwell v. *Taggart*, 4 Pet., 190.
Robertson v. *Carson*, 19 Wall., 94.
Hoe vs. *Wilson*, 9 Wall., 501
Railroad Company vs. *Orr*, 18 Wall., 471.
U. S. vs. *Union Pacific R. R.*, 98 U. S., 569.
Sec. 50 Foster's Fed. Pr., p. 123.

(*D.*) Justice Swayne in delivering the opinion of the court in the case of *May* vs. *Le Claire, 11 Wall., 236*, says: "Equity sometimes takes jurisdiction on account of the parties and sometimes on account of the relief proper to be administered. The same considerations which invoke the jurisdiction may control the remedy." Judge Sanborn in rendering the opinion of the court in the case of *Sioux City Terminal R. R.* vs. *Trust Company of North America, 82 Fed. R., 126*, says: "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree between the parties before the court, cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

Justice Field in delivering the opinion of the Court in the case of *Horn* vs. *Lackhart, 17 Wall., 579*, says:

"The objection to the jurisdiction of the Court that two of the defendants were residents of Texas, the same State with the complainants, was met and

obviated by the dismissal of the suit as to them. They were not indispensable parties; that is, their interests were not interests interwoven and bound up with those of the complainants or other parties, that no decree could be made without necessarily affecting them, and it was only the presence of parties thus situated which was essential to the jurisdiction of the Court. The rights of the parties other than the defendants who were citizens of Texas could be and were adequately and fully determined, without prejudice to those defendants. And the question always is or should be when objection is taken to the jurisdiction of the Court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the Court should be retained and the suit dismissed as to them."

(*E.*) *On a bill to enforce a mortgage given to trustees where a majority of the trustees are parties, the other trustee is not necessary.*

Stewart vs. *Chesapeake & Ohio Can. Company*, 1 Fed. Rep., 361.
Mechanics' Bank v. *Seton*, 1 Pet., 299.

(*F.*) *If the defendant has a distinct interest and substantial justice can be done, jurisdiction attaches as to him alone.*

Cameron v. *McRobert*, 3 Wheaton, 591.
Nesmith v. *Cadberg*, 1 Wood and M., 34.

(*G.*) *A defendant who has a severable interest by making him a defendant would deprive the court of jurisdiction of the suit the bill should be dismissed as to him.*

Corn v. *Lockhart*, *supra*.

(*H.*) *Amendments thus allowed to affect the jurisdiction relate back and become a part of the original bill.*

Gaylor v. *R. R. Co.*, 6 Biss., 287.
Fed. Case, 52, 84.

(*I.*) *Amendments can be allowed to the pleadings for the purpose of more fully presenting the facts at issue between the parties even after a reversal by the Supreme Court of the decree. In re vs.* Sandford Fork & Tool Company, 160 U. S., 247, a defect of parties may be cured by amendments.

Douglass v. *Butler*, 6 Fed. Rep., 228, or by striking out parties.
Connolly v. *Taylor*, 2 Pet., 556.
Cole v. *S. M. Coe* vs. Virginia G. H. W. Co, 1 Saw., 470 Fed. Case, 2989. Striking out defendant.
Greeley v. *Smith*, 3 Story; 76 Fed. Cas., 5747.

If a declaration fails to allege the matter in controversy it may be amended.

Laming v. *Dalph*, 4 Wash. C. C., 624; Fed. Case, 8073.

(*J.*) *Equity rule 35 is passed upon when the amendments which are desired to be made are shown.* (*p. 22*).

National Bank v. *Carpenter*, 101 U. S., 567.

Plaintiff may show a subsequent capacity to sue after demurrer is sustained.

Swatzee v. *Arnold*, 1 Wool., 483; Fed. Case, 13,682.

(*K.*) *Where a new cause of action is intended by amendment it may be allowed when it corresponds with the original bill.*

U. S. vs. *Distilled Spirits*, 1 Abb. U. S., 573; Fed. Case 15,943.

(*L*) *An amendment which changed even the character of the bill was allowed in a special case, even after final decree.*

Tremolo patent, 23 Wall., 518.

In the case of *Howe* v. *Jameson*, *166 U. S., 395*, the suit was brought by citizens of the District of Columbia in the United States Circuit Court for the District of Wisconsin against citizens of the State of Wisconsin; the defendants, moved to dismiss the action unless the plaintiffs should within five days thereafter so amend their complaint as to allege the necessary jurisdictional facts. Plaintiff then moved for leave to amend their complaint by averring that three of them were, when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the State of Minnesota, and that each was the owner of an undivided one-fourth of the land and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied and the action dismissed. Plaintiffs then sued out a writ of error under the Act of March 3, 1891, Sec. 517, and the Circuit Court certified to this Court these questions of jurisdiction:

FIRST.—Whether or not said complaint sets forth any cause of action in which there is a controversy between citizens of different States, so as to give said Circuit Court jurisdiction thereof.

SECOND.—Whether or not said complaint, as so proposed to be amended, would, if so amended, set forth any cause of action, in which there is a controversy between citizens of different States so as to give said Circuit Court jurisdiction thereon.

Chief Justice Fuller rendered the opinion of the Court, and he held that the Circuit Court had no jurisdiction of the action because three of the plaintiffs being citizens of the District of Columbia there was no controversy between citizens of different States. He further said *there was no appli-*

cation made for leave to discontinue as to the three plaintiffs who were citizens of the District of Columbia and to amend the complaint and proceed with the cause, in favor of the plaintiff alleged to be a citizen of Minnesota.

The difference between the above case and the one at bar is that the plaintiff in the case at bar has asked leave to dismiss as to the defendants who are citizens of the State of New Jersey and amending the bill of complaint by alleging facts that the "fund" in question is a "trust fund" and that therefore the controversy is between citizens of different States with reference to the control of that fund, pending the suit in Utah.

In the above case we surmise that had the plaintiff dismissed as to the three citizens of the District of Columbia this Court would have held in that case that the United States Circuit Court of the District of Wisconsin had jurisdiction over the controversy in reference to the land located in Wisconsin on behalf of the plaintiff who was alleged to be a citizen of the State of Minnesota against the defendants who were alleged to be citizens of the State of Wisconsin.

POINT V.

It is not true as appellees insist that the shares of the Rio Grande Western Company referred to in the advertisement, belong to themselves and to those they represent.

(*A.*) In other words the appellees insist this bill is brought for the purpose of taking from appellees' firm moneys belonging to that firm and other moneys which they hold or about to hold for others, and for which they are liable to others.

(*B.*) They further insist that the persons whom they represent, not being made parties to the bill of complaint, the moneys referred to cannot be taken from the appellees.

(*C.*) The appellees insist further that every member of the firm of Spencer Trask & Company is directly interested in the result of this suit, and that for that reason every member of this firm is a necessary party to this suit.

The appellee Edwin M. Bulkley, in his affidavit, in speaking of the object of the advertisement in the *Herald*, says (P. R., 11, 12, 13), that the proposed purchasers of the stock of the Rio Grande Western Railway Company were not familiar with the suit pending in the Utah Court, and that *appellee's firm was familiar with that suit*, and felt bound to protect the purchaser against loss or diminution of the value of the common stock to be so purchased in case the complainant's claim against the said Spurs should turn out to be valid, and, therefore, my firm agreed to indemnify the proposed purchaser against loss, if any, by reason of such suit. Appellee further says in his affidavit that his said firm was the owner of some of the common shares proposed to be sold, and in stipulating to sell as many as 90,000 shares, it had the assent of such other holders of such common stock, and that after making the agreement to sell the stock it invited other owners who cared to join in the sale to deposit their shares with his firm for the purpose of such sale, and that it was deemed proper that all the owners of such common stock who should avail themselves of the sale, should indemnify the firm against any liability by reason of such guarantee. My firm, therefore notified the holders of the common stock that if they availed themselves of the sale they must permit the firm to deduct from the purchase price when paid, a suitable amount to indemnify the firm against liability to the purchasers.

In the published notice in the *Herald* appellee's

firm said (P. R., 4), that from the eighty dollars per share for which the firm have agreed to sell the shares the firm will deduct such amount per share as will protect the firm against such guarantee and says further: "*Such amount will be held in a special "trust.*"

Appellee George Foster Peabody, in his affidavit (P. R., 73) says: "The result of this provision is that if the complainant has any just claim its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts *but also by a special amount to be held in trust.*" * * * "*As it gives a greater assurance that if the complainant's claim shall be established it will be paid.*"

Is it not therefore manifest from not only the declaration of the notice in the *Herald* that "*such amount will be held in a special trust*"? Not only for the purchasers of the stock who were not familiar with the Utah suit but as a "*greater assurance*" *that if the complainant's claim should be established it will be paid.*"

(*D.*) *Does not the words quoted establish an obligation to the complainant on the part of the appellees, that the amount of money so set aside is a special trust, for the very purpose of clearing up the title to the Spurs in litigation in the Utah suit, in case complainant succeeded in that suit?*

(*E.*) Appellant insists *that a trust fund was created,* and while it was moneys contributed by not only the appellee's firm but by other stockholders who were anxious that the sale of the Utah Road should be made to the Colorado Road, *it was with the understanding that in case the complainant succeeded in the Utah suit that that trust fund should be used, as the appellee, George Foster Peabody, distinctly says "A special amount to be held in trust, as a greater assurance that if the complainant's claim should be established it will be paid,"* and if

the complainant does not succeed in his Utah suit then that the moneys contributed to said trust fund will be returned to the parties contributing the same.

Now the moment complainant in the court below comes into a court of equity and asks the aid of the Court *to put this trust fund* in a position where in case complainant shall succeed in his Utah suit that fund shall be applied towards the liquidation of complainant's claim, if any deficiency judgment shall be established in his favor in the Utah suit, then we hear for the first time the appellee's contention contrary to their own declarations, viz., that this bill of complaint in the court below is an attempt to deprive the appellees individually as members of that firm of their respective interests as a firm in that money.

Appellees concede that the Utah suit is still pending and undetermined; how, then, can the appellees be injured by the restraining order made by his Honor Addison Brown, wherein the appellees "are enjoined (P. R., 87) until the further order of this Court from paying out or parting with the fund or moneys for indemnity to them or *special trust* which shall come to or be in their hands or under their control pursuant to their advertisement?"

This order was what the appellees offered to do and which his Honor Judge Brown considered the appellant had a right to expect in case complainant succeeded in his Utah suit to have this money applied towards complainant's claim.

(*F.*) Again appellant's amendments as proposed and appellant's supplemental bill as proposed, *show distinctly that it was the understanding by the persons contributing to that fund that the fund should be used as a trust fund for the purposes indicated.*

(*G.*) *The relations of the appellees therefore, to that fund was that of trustees for the benefit of the cestui que trusts* of which the appellant was the

chief beneficiary and had a right if he apprehended waste in his mortgage security by the diversion of the net earnings the $800,000 then in the possession of the Rio Grande Western, to have that fund put under the control in a court of equity, pending that Utah suit.

(*H.*) Appellant concedes that there are none of the other contributors to this fund, parties to this action. Appellant insists that it is not necessary that they should be parties if, as a matter of fact, *they have consented that the appellees shall act as trustees of that fund for the purpose of using the same for the purposes indicated.*

(*I.*) The service of process in this action upon Acosta Nichols, the appellee, who is conceded to be a citizen of the Southern District of New York, as a member of the said firm, and the *fund itself being within the jurisdiction of the Court,* it being conceded by appellees that the firm is engaged in carrying on the banking business in the City of New York, such a decree of distribution of said fund will be sufficient protection to the members of that firm against any claim of liability on behalf of the contributors to said fund.

(*J.*) The appellees sumbitted the following authorities in the Court below to undertake to sustain their theory that the rights of the appellees concerning said fund *is that of partners and not trustees.*

The case of *Stone* vs. *South Carolina, 117 U. S., 430,* was a suit brought originally by the State of South Carolina in its own court to recover moneys in the hands of two partners, Corbin and Stone. Stone sought to remove the cause to the Federal court on the ground that although his partner was a citizen of South Carolina he himself was a citizen of New York and the presence of his co-defendant being such citizen of South Carolina, was not essential to a final determination of the contro-

versy so far as he was concerned. This Court denied the Federal jurisdiction because Chief Justice Waite in rendering the opinion said "that neither is there any separable controversy in the case such as might, if necessary citizenship existed, allow Stone to renew the suit without joining Corbin in the petition for removal." In other words, Stone & Corbin as a firm had collected money belonging to the State of South Carolina, and a firm obligation existed to repay that money to the State.

(*K.*) There is no such principle as in the above case involved in the case at bar, viz., *the parties who deposited this money in the hands of the appellees as trustees are not seeking in this Court to compel the appellee's firm to return to them the money. Appellant is not seeking an individual judgment against members of appellee's firm, only seeking to have the fund administered by the Court below instead of by the appellees in case complainant succeeds in the Utah suit.*

The case of *Bell* vs. *Donahue, 17 Fed. Rep., 710,* which appellees cite, was where a bill was filed to set aside a conveyance made to one member of the partnership of property acquired by him in his individual name but in behalf of the partnership. It will be seen therefore that the real question was as to how the partnership rights in the property could be determined without all the members of the partnership were defendants, which if done would make one of the partners a citizen of the same State with complainant thereby ousting the jurisdiction of the Court.

(*L*). This is not the case at bar. The money constituting the *trust fund does not belong to the firm of Spencer Trask & Company. It belongs to the parties contributing and the firm only has a legal title, not an absolute ownership of the fund.* The appellant is one of the beneficiaries of that fund and the

principal beneficiary in case of the success in the Utah case.

In the case of *Duchesse d'Auxy* v. *Porter*, *41 Fed. Rep.*, *68*, cited by appellees, the suit was by an administrator of a deceased partner against three surviving partners, two of whom were citizens of the same State, as complainant. There was no dispute but what they were partners and of course, that fact being admitted it was essential that all the partners were indispensable parties to the litigation, and in making them parties to the litigation they deprived the Court of jurisdiction.

(*M.*) Appellant insists that the firm of Spencer Trask & Company has no interest in the controversy in this action *except that as trustees of a fund* to be administered in an emergency, and that being true, and the *Court having jurisdiction of the firm*, and a service of process upon one member of that firm, Acosta Nichols, it is sufficient to give the Court jurisdiction.

The case of *Adams* v. *May*, *27 Fed. Rep.*, *907*, cited by appellees, was a case where on an application for a removal to the federal court it was simply alleged that the defendant's firm was a resident of a different State than the plaintiff, and it was held that the diverse citizenship was not sufficientiy alleged.

In the case at bar in the proposed amendment to the bill of complaint in the court below the complainant offered to dismiss as to the appellees, Bulkley and Charles J. Peabody, who were citizens of the same State as plaintiff. Said proposed amendments alleged that said last named appellees' interests in said firm were that of junior partners, while a majority of interest in the firm was owned by Spencer Trask and George Foster Peabody, and due service of process has been made upon the three remaining members of that firm, Spencer Trask, George Foster Peabody and Acosta Nichols, which was sufficient

to give the Court jurisdiction over *the fund* in case of complainant's success in the Utah suit.

The case of *Mason* v. *Eldred, 6 Wall, 231-235*, which was cited by appellees, was a suit where the only question in controversy was concerning a copartnership obligation, and, therefore, it necessarily involved the obligations of each partner, and that if such necessary party as a member of a copartnership is not brought into the action, the omission to do so may be pleaded in abatement.

This is not the case at bar. The appellees by their own admissions, both by the notice in the advertisement in the *Herald* as well as by the respective affidavits of the appellee Bulkley and of George Foster Peabody, above quoted, that the fund in controversy is admitted to be *a trust fund, and not a copartnership obligation, and, therefore, it is not essential, for the adjudication of the rights of all parties in interest, that only the Court has jurisdiction on the fund in question as it has already acquired in this case, and of which his Honor Judge Addison Brown took jurisdiction when he made the order above referred to.*

The Court will observe that in this suit the rights of Messrs. Bulkley and Charles J. Peabody are not involved, and that it is in this action not sought to take from them their property or to recover a personal judgment against them, because it is only an action to administer upon the fund in question to carry out the admitted purpose of the creation of that fund by the admissions of the members of the appellees themselves.

POINT VI.

One member of a copartnership having been served with process it is held in this court against whom the

Court has taken jurisdiction, may as to partnership assets even admitting that there was some joint liability of this firm over the moneys in question, the partnership assets in question are concluded by a judgment obtained by such service.

(*A.*) The state courts and the federal courts alike will permit a judgment binding partnership assets and against a party actually served binding him individually.

Barney v. *Baltimore City*, 6 Wall., 280–7.

Hall v. *Lansing*, 91 U. S., 160, 166–169.

(*B.*) The judgment of the Court in the court below, with the service of the subpœna against the appellee, Acosta Nichol, affecting the rights of the members of the firm of Spencer Trask & Company *to the trust fund* in question, is binding upon all the other members of the firm, whether they were served with process in the action or not.

POINT VII.

The bill of complaint in the court below can be sustained as an ancillary bill.

In the case *of Pacific R. R. of Miss.* v. *Miss. Pac. R. R.*, *111 U. S.*, *505*, Justice Blatchford in defining what is an ancillary bill, says, that in ancillary bills the Circuit Courts of the United States have jurisdiction, although the complainant and some of the defendants may reside in the same district.

Under the act of March 3, 1875, Section 8 pro-

vides: That if any suit to enforce any legal or equitable claim or to remove any lien or cloud on property situated in the district where the suit was brought, inhabitants thereof can be made parties and brought into court for the purpose of enforcing the lien.

In the case of McBee *vs.* Marietta & N. G. Ry. Co., 48 Fed. Rep., 243, it was held that under the section above referred to that for the purpose of enforcing various liens upon part of the railroad lying in the district against the lien of a general mortgage which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district, an original bill may be maintained though some of the defendants are not residents of the district. While such a bill is an original bill, within the meaning of that term as used in equity pleading, yet the suit in its essence is ancillary to the foreclosure suit, which it seeks to oppose, hence the Court's jurisdiction is unaffected by the fact that some of the defendants are residents of the same State as complainant, and the Court has jurisdiction.

In the case of *Greely* vs. *Lowe*, *155 U. S.*, *58*, page 73, Mr. Justice Brown says: "That where the *res* is within the jurisdiction of the court where the suit is brought to enforce a lien and persons in control of the fund are not found within the district so as to serve process, they may be brought in by publication under Section 738."

We therefore submit that the Court below had jurisdiction of this case.

Respectfully submitted,

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